No. 93-1636

In The

Supreme Court of the United States

October Term, 1994

TOM SWINT, TONY SPRADLEY,
DRUCILLA JAMES and JEROME LEWIS,

Petitioners,

v.

CHAMBERS COUNTY COMMISSION,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF AMICUS CURIAE OF JEFFERSON COUNTY, ALABAMA SUPPORTING RESPONDENT

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Jefferson County, Alabama (hereafter "Jefferson County") respectfully submits its brief *amicus curiae* in support of the respondent. Pursuant to Rule 37, all parties before this Court have consented to the filing of this brief.

INTEREST OF AMICUS CURIAE

Jefferson County, in terms of population, is the largest county in Alabama. Jefferson County Sheriff Mel Bailey employs 570 deputies, the largest number in the

State of Alabama. The Jefferson County Commission exercises no statutory control over the law enforcement activities of the Sheriff nor does the Jefferson County Commission exercise any actual control of any kind over the Sheriff's law enforcement activities. The County Commission is merely the source of funding for the Sheriff's operations. Under the Jefferson County personnel merit system established by Alabama Act 248, Regular Session, 1945, the Sheriff is an independent appointing authority with complete control over the hiring and firing of deputies and support personnel. *Wilson v. Bailey*, 934 F.2d 301 (11th Cir. 1991). The Sheriff makes all decisions regarding assignment of duties and responsibilities pertaining to the operation of his department.

On several occasions, the Eleventh Circuit Court of Appeals has affirmed summary judgment, or otherwise ruled in favor of Jefferson County, based upon the County's lack of control over the Sheriff and his deputies. *See e.g. Tittle v. Jefferson County Comm'n*, 10 F.3d 1535 (11th Cir. 1994) (*en banc*); *Dean v. Barber*, 951 F.2d 1210 (11th Cir. 1992); *Wilson*, 934 F.2d at 301. Implicit in these rulings is a recognition that Jefferson County should not be held liable for the acts or omissions of the Sheriff because it does not control the Sheriff's exercise of discretion in the performance of his law enforcement duties and responsibilities. Indeed, in *Dean*, the Eleventh Circuit held that the Sheriff and his deputies are employees of the State of Alabama. The Court affirmed the principle that the County Commission could not be held liable for the acts or omissions of the Sheriff and his deputies on a respondeat superior liability basis.

If this Court elects to reverse the judgment of the Eleventh Circuit Court of Appeals in the instant case, and impose liability upon Alabama counties, including Jefferson County, the impact of such a ruling would not only be contrary to this Court's precedent but could devastate Alabama counties' limited fiscal resources.

STATEMENT OF THE CASE

Amicus Jefferson County incorporates and adopts by reference the "Statement of the Case" included in the Respondent's Brief.

SUMMARY OF ARGUMENT

The Eleventh Circuit Court of Appeals properly determined that, under Alabama law, sheriffs are state rather than county policymakers with respect to law enforcement. The analysis used by the Eleventh Circuit to reach this conclusion was inherently sound: how can a sheriff be said to represent county policy when he is a state officer, acting to enforce state law (Alabama's criminal code), and is in no way answerable to the county's governing body for policy decisions or conduct of his department? Neither the Petitioners nor their *amici* are able to penetrate this logic. Instead, they merely point out the fact that Alabama counties fund the sheriff's office, often at levels mandated by state law, and that county voters elect the sheriff (as if to say the voters should have

foreseen that they were electing a tortfeasor) and conclude "If this analysis was good enough for the Sixth Circuit, it should not be questioned."

Of course, the reasoning of the Eleventh Circuit in the opinion below is in direct conflict with the approach taken by the Sixth Circuit in *Pembaur v. City of Cincinnati*, 746 F.2d 337, 341 (6th Cir. 1984) and, presumably, that is why a writ of certiorari was granted. Because Alabama law has clearly, at least since the Constitution of 1901, established sheriffs to be executives of the state, an "arm of the governor . . . to see that the laws are faithfully executed,"[1] who are, pursuant to state statutes, supervised by state judges, there is no basis for finding them to be anything other than state policymakers in the area of law enforcement.

What the Petitioners and their *amici* fail to appreciate is, due to the lack of "home rule", the inherent weakness of Alabama county governments, especially in relation to law enforcement. There is no county law enforcement policy because counties have no law enforcement powers. The theory propounded by the Petitioners – hold the county liable for all officers who are elected from within the county's boundaries and are funded by the county regardless of function or control – is contrary to logic and would bring a host of state officers under the burgeoning umbrella of county liability. Petitioners' theory, if extended to its logical conclusion, would also, apart from state law, create new entities capable of incurring liability

[1] *Official Proceedings of the Constitutional Convention of the State of Alabama*, May 21 to September 3, 1901, Vol. I, 882-83.

under 42 U.S.C. § 1983: regions made up of two or more counties which "jointly" elect and fund state officers.

The Respondent's "right of control" paradigm presents a far more logical and practical way of distinguishing between state and county policymakers for purposes of constitutional tort liability: the governmental entity which is able to extend, limit, abolish, or otherwise control the power of a certain officer should be liable for the consequences of that officer's conduct or policies. For instance, Alabama counties *should* be liable if their commission or county road engineer (appointed by the commission) approves a racially discriminatory policy with respect to the hiring of county road workers. However, the county should not be liable when it could do *nothing* to prevent or correct misconduct of a particular state officer, like the sheriff. The Court of Appeals for the Eleventh Circuit should be affirmed.

ARGUMENT

I. ALABAMA LAW UNEQUIVOCALLY ESTABLISHES LOCAL SHERIFFS TO BE STATE OFFICIALS UNDER STATE CONTROL WHEN THEY PERFORM LAW ENFORCEMENT FUNCTIONS.

All parties agree that the question of whether local officials are final policymakers for a particular governmental entity is to be determined by looking to state law. *See* Petitioners' Brief at 10; Respondent's Brief in Opp'n to Pet. for a Writ of Cert. at 5 (*quoting Pembaur v. City of Cincinnati*, 475 U.S. 469, 483 (1986) (plurality opinion)). *See also City of St. Louis v. Praprotnik*, 485 U.S. 112, 126

(1988); *Jett v. Dallas Indep. School Dist.*, 491 U.S. 701, 737-38 (1989) (plurality opinion). Consequently, the question before the Court is whether the court of appeals below properly interpreted Alabama law on the matter of whether sheriffs are exercising final county policymaking authority when they enforce the state's criminal law. If any state's laws have "sp[oken] with perfect clarity" to this question, it is Alabama's. *See Praprotnik*, 485 U.S. at 125-126 ("We are not, of course, predicting that state law will always speak with perfect clarity [on this issue].").

A. Alabama's Constitution of 1901, besides designating sheriffs as members of the state's executive department, centralized control over sheriffs with the state.

Alabama's current constitution, the Constitution of 1901, describes sheriffs as members of the executive department of the State of Alabama. Ala. Const. of 1901 art. V, § 112. Delegates at the Constitutional Convention of 1901 expressed their concerns about the then-current state of the law (prior to 1901), which held sheriffs accountable *only* to local constituencies.

> Sheriffs are elected by the people of a county. They are not elected by the people of the state at large, and they are only state officers in the sense that they are part of the executive. They are not responsible to the chief executive of the state, but they are responsible to the people who elected them. Under the law as it now is [prior to the Constitution of 1901] . . . [if] they fail to perform the duty imposed upon them by law, . . . the enforcement of that law and their removal from office is placed in the hands of the courts of the *county* in which they serve.

Official Proceedings of the Constitutional Convention of the State of Alabama, May 21 to September 3, 1901, Vol. I, 878 (1940) (emphasis added) (hereafter "*Official Proceedings*"). This lack of centralized state control had, at least to the thinking of the 1901 constitutional convention attendees, allowed sheriffs to ignore, without accountability, various acts of mob violence and vigilantism including lynchings. *See Parker v. Amerson*, 519 So. 2d 442, 443 (Ala. 1987); *Official Proceedings*, at 879 ("So long as the Sheriff can with impunity turn over his prisoner to a mob and let them take him and do as they will with him and *only be answerable to the people of his county* where the crime is committed, . . . lynch-law will prevail in the State of Alabama.")

In an effort to combat this disturbing trend of violence, former Alabama Governor Thomas G. Jones proposed significant changes in the way sheriffs could be removed from office for neglect of duty. The practical effects of these enactments were that, "sheriffs were made more accountable to the supreme executive officer of the state, the Governor, . . . and the [Alabama] Supreme Court [obtained] original jurisdiction to hear impeachment proceedings against sheriffs." *Parker*, 519 So. 2d at 444. *See* Ala. Const. of 1901 art. V, § 138, App. at 2; Ala. Const. of 1901 art. VII, § 174, App. at 4; Ala. Const. of 1901 amend. No. 35, App. at 5. The grounds for impeachment of the sheriff were also expanded to include his failure to prevent harm being done to those within his custody. *See* Ala. Const. of 1901 art. V, § 138 ("Whenever any prisoner is taken from jail, or from the custody of any

sheriff or his deputy, and put to death, or suffers grievance bodily harm, owing to the neglect, connivance, cowardice, or other grave fault of the sheriff, such sheriff may be impeached under § 174 of this Constitution.")

The convention delegates viewed the power to originate impeachment actions against sheriffs to be a vital weapon in the governor's arsenal, without which he could not insure the faithful execution of state law.

> We have already passed upon the question as to whether the governor of Alabama shall be charged in this Constitution with seeing that the laws of this State are faithfully executed, and we have already by an article which has been passed upon by this Convention declared that it shall be the duty of the governor to see that the laws of the State are executed. The governor is an executive officer. *Each sheriff is an arm of the governor and it is only through the sheriff that the governor can see that the laws are faithfully executed in each county although the sheriff represents the executive in the county where he is elected and where he perform[s] his duties.* As we have charged the governor in the Constitution with seeing that the laws are faithfully executed, it would seem that it would be proper also in the very same Constitution to have a provision whereby he may have some authority to act, and whereby he can require the executive officer in each county to perform his duty and to faithfully execute the law.

Official Proceedings, at 882-83.

The 1901 Constitution also vested the governor with the power to "require information in writing, under oath, from the officers of the executive department [which

includes sheriffs] . . . relating to the duties of their respective offices. . . . " Ala. Const. art. V, § 121 (1901), App. at 1. The giving of a false report by a member of the executive department to the governor was elevated into an impeachable offense by the 1901 Constitution. *See* Ala. Const. art. VII, §§ 173, 174, 175 (1901), App. at 3-5. *Cf.* Ala. Const. art. V, § 9 (1875) (False report to governor was the equivalent of perjury which could only be heard in local courts.).

B. Alabama's statutory framework further strengthens the sheriffs' ties with the state.

State law places sheriffs under the supervision of state circuit judges. Alabama Code § 12-17-24 mandates that "[t]he presiding circuit judge shall exercise a general supervision of the judges, clerks, registers, court reporters, bailiffs, *sheriffs* and other court employees of the circuit and district courts within the circuit, except employees for the clerk, and see that they attend strictly to the prompt, diligent discharge of their duties." Ala. Code § 12-17-24 (1975) (emphasis added). This supervision is not one in which "a presiding judge can direct and usurp the functions and duties of the named officials." *Resolute Insurance Co. v. Ervin*, 234 So. 2d 867, 870 (Ala. 1970). Rather, the judge's supervisory power extends only to ensure "that officials promptly and diligently discharge their duties." *Id.*

Additionally, pursuant to statutory enactments, the minimum training requirements of sheriff's department employees are established by the *state* rather than the

county[2] and are supervised by a state agency. *See* Ala. Code § 36-21-46 (1975).[3] Likewise, though compensation for sheriffs and their deputies is taken out of the county treasury, *state law* establishes their rate of compensation. Ala. Code §§ 36-21-16, 36-21-10 (1975).

Finally, state law gives Alabama governors the power to fill all vacancies in the office of sheriff. *See* Ala. Code § 36-9-17 (1975); *McRae v. State*, 112 So. 2d 487 (Ala. 1959). Out of sixty-seven sheriffs, vacancies are a common occurrence. Presumably under the Petitioners' theory emphasizing electoral base, the elected sheriffs would be county policymakers while appointed sheriffs would be state policymakers, with no difference in function or authority.

C. County governments in Alabama are, by design, very limited in function and exercise no law enforcement authority.

Alabama counties are powerless to control the sheriffs, their deputies, or their law enforcement policies. In fact, as this Court recently stated, the primary function of the counties' governing body, the county commission, is

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[2] In contrast, Alabama county commissions have no "authority to hire, fire, train . . . [or] assign deputy sheriffs." *Sanders v. Miller*, 837 F. Supp. 7106, 7110 (N.D. Ala. 1992); *see Carr v. City of Florence*, 916 F.2d 1521, 1525-26 (11th Cir. 1990); *Terry v. Cook*, 866 F.2d 373, 377 (11th Cir. 1989).

[3] *Cf. Davis v. Mason County*, 927 F.2d 1473, 1481 (9th Cir. 1991). As one ground for holding the county liable for acts of sheriff's deputies, the Ninth Circuit found that the state merit law did *not* cover the training of sheriff's deputies.

to oversee county road construction and repair. *Presley v. Etowah County Comm'n*, 502 U.S. 491 (1992) (Kennedy, J.) (holding that routine decisions of Alabama county commissions with respect to road management do not implicate the Voting Rights Act of 1965). Alabama counties, through their commissions or otherwise, are severely constricted in their influence and are "authorized to do only those things permitted or directed by the legislature of Alabama." *Lockridge v. Etowah County Comm'n*, 460 So. 2d 1361, 1363 (Ala. Civ. App. 1984).

In *Lockridge*, Alabama's intermediate level appellate court rebuffed one county's attempt to bring personnel of the sheriff's department under county control. The court found that no authority existed for the commission "to promulgate work rules for the employees of the sheriff's office, especially the sheriff's deputies. In the absence of such authority, [the court was] constrained to hold that the Etowah County Commission has no power to grant leaves of absence to the sheriff's deputies. The sheriff is the only official who has such authority." 460 So. 2d 1361, 1363 (Ala. Civ. App. 1984).

Although *Lockridge* did not involve the type of law enforcement policies involved in the instant case (i.e., alleged unconstitutional searches and seizures), the holding certainly illustrates the relative powerlessness of Alabama counties with respect to the sheriff. Alabama counties have no inherent "police powers," are unable to enact criminal codes, and must rely exclusively upon the state and its agents for law enforcement.

The only link between the county commission and the sheriff that the Petitioners are able to point out is

fiscal. According to state law, the sheriff's salary comes out of county funds and the county is obligated to provide the sheriff's department with quarters, office supplies, equipment, and automobiles. Ala. Code §§ 36-22-16, 36-22-18 (1975 & Supp. 1991). However, the mere fact that counties provide a portion of the sheriff's department's fiscal needs, as mandated by *state law*, is not the equivalent of county control over law enforcement. First, the county does not have "unfettered discretion" over the granting or denial of the sheriff's reasonable budgetary requests. *See Etowah County Comm'n v. Hayes*, 569 So. 2d 397, 399 (Ala. 1990); *Morgan County Comm'n v. Powell*, 293 So. 2d 830 (Ala. 1974). In other words, a county commission could not legally give the sheriff the ultimatum: either reform your policies or we will refuse to fund the hiring of new deputies or the purchase of new squad cars. Additionally, sheriffs are partially funded from sources wholly outside of county authority, such as proceeds from drug-related offense forfeitures and fees from pistol permits.

D. The extent of state control over county sheriffs is well-illustrated in Jefferson County.

Jefferson County, like the other sixty-six counties in Alabama, has little, if any, day-to-day control over the sheriff and his deputies, nor does it have the ability to set salaries, make provisions for retirement benefits or hire chief deputies and assistants without approval by the state legislature. Virtually every aspect of the sheriff's office is controlled and regulated by the state, not the county. For example, the release of certain prisoners, 1951

Ala. Acts 94, and the disposal of contraband by purchasing agents, 1969 Ala. Acts 522, which are very specific to Jefferson County's sheriff's department, are mandated or regulated pursuant to enactment by the state. These acts exemplify the county's lack of control over the most minuscule decisions affecting the sheriff's department.

Even where the county commission has some discretion over assignment of offices in the Courthouse or quarters for elected officials, the Alabama Supreme Court has made a special exception for the Sheriff. *See Orange v. Bailey*, 548 So. 2d 424 (Ala. 1989) (holding county did not have discretion to assign Sheriff to quarters other than those located in the courthouse). If the County cannot even tell the Sheriff where his offices will be, how can it be said to control his law enforcement activities.

The county commission also has no control over the salaries, fees or allowances to sheriffs, deputies or their assistants; rather, the state legislature provides for such. Compensation and appointment of the Assistant Sheriff of the Bessemer Division of the Jefferson County Sheriff's Department, compensation for the Executive Assistant to the Sheriff of Jefferson County, and the Chief Deputy of Jefferson County, are all mandated by the state, with no county participation. 1988 Ala. Acts 88-937 (1st Special Sess.); 1987 Ala. Acts 87-790; 1988 Ala. Acts 88-851 (1st Special Sess.). Fees for the service of summons, and deputies witness fees, as well as the regulation of fees, and the determination of pistol permit fees, which provide a large amount of money to the Sheriff outside of that amount allotted to him by the county, are all legislated by the state, not the county. 1973 Ala. Acts 331; 1964 Ala. Acts 102; 1965 Ala. Acts 513; 1975 Ala. Acts 369. The state also

determines the sheriff's expense allowance, and the deputies subsistence allowance. 1989 Ala. Acts 89-791; 1988 Ala. Acts 88-897 (1st Special Sess.).

E. The state law authority cited by the Petitioners does not establish that sheriffs are county policymakers.

The Petitioners' cite to several cases in support of their argument that "Alabama law and the Alabama courts frequently have expressed the common understanding of the sheriff as a county-based official setting policy for the county." Petitioners' Brief at 14. However, none of the cited cases address the question of law enforcement policymaking authority; rather, they are directed to extremely narrow contexts.

First, *Jefferson County v. Dockerty*, 30 So. 2d 474 (Ala. 1947), while describing the sheriff of Jefferson County to be a county officer, merely did so for the purpose of identifying officers who were to pay fees, cost and commissions into the county treasury pursuant to Ala. Code, Title 62, § 139 (1940). *Dockerty*, 30 So. 2d at 477 ("the sheriff of Jefferson County is undoubtedly a county officer *within the meaning of section 139*") (emphasis added).

Similarly, in *In re Opinions of Justices*, 143 So. 345 (Ala. 1932), the Alabama Supreme Court, in the context of discussing the regulation of fees, salaries and allowances paid by the county under the Second Amendment to the Constitution of 1901, held that "the officeholders there mentioned," which included the sheriff, "are county officers *within the meaning of Amendment 2 to the Constitution of 1901.*" *Id.* (emphasis added). Nowhere does the court

discuss the issue of "county-based official[s] setting policy for the county." Petitioners' Brief at 14.

Also, in *State ex rel. Attorney General v. Pratt*, 68 So. 255 (Ala. 1915), a case involving the impeachment of a judge, the only mention of a sheriff was in the court's review of an earlier case regarding the impeachment of a sheriff. Although the *Pratt* court stated that a sheriff was "the highest purely executive officer of a county," *Id.* at 257, this statement is certainly not dispositive on the issue of sheriffs acting as policymakers for the county. Similar statements have been made in regard to other officers whose jurisdiction is limited to the county, yet who are clearly *state* officers. For example, Alabama District Attorneys have been defined as "the foremost representative[s] of the executive branch of government in the enforcement of the criminal law in [their] county." *Dickerson v. State*, 414 So. 2d 998, 1008 (Ala. Crim. App. 1982). However, there is no dispute over the fact that District Attorneys are officers of the state falling within the purview of the executive branch of government. *Id.*; *see Piggly Wiggly No. 208, Inc. v. Dutton*, 601 So. 2d 907 (Ala. 1992).

Finally, *First Mercury Syndicate, Inc. v. Franklin County*, 623 So. 2d 1075 (Ala. 1993) makes no mention whatsoever of policymaking officials for the county. Presumably, the Petitioners cite *Franklin* because the county paid for the sheriff's insurance. However, the fact that one county decides to provide insurance for its sheriff adds nothing to the argument that all sheriffs are final county policymakers with respect to law enforcement.

II. IN STATES LIKE ALABAMA, WHERE SHERIFFS ARE STATE OFFICERS FOR PURPOSES OF ELEVENTH AMENDMENT IMMUNITY, IT WOULD BE INCONSISTENT TO DEEM THEM ANYTHING OTHER THAN STATE POLICYMAKERS.

Beginning with *Monell v. Dep't of Social Services of City of New York*, 436 U.S. 658 (1978),[4] this Court has held that "official-capacity suits generally represent only another way of pleading an action against an entity of which an officer is an agent. . . . " *Monell*, 436 U.S. at 690 n.55. This Court made "explicit" what it previously only implied: "a judgment against a public servant 'in his official capacity' imposes liability on the entity he represents. . . . " *Brandon v. Holt*, 469 U.S. 464 (1985). The Court in *Brandon* noted that, for purposes of evaluating the liability of the City of New York, the opinion in *Monell* "clearly equated the actions of the Director of the Department in his official capacity with the actions of the city itself." *Id.* at 472 (footnote omitted).

This Court has consistently noted that a suit against a state official in his official capacity is in essence a suit against the state and is, therefore, barred by the Eleventh Amendment to the United States Constitution. A suit against a state official in his or her official capacity, "is not a suit against the official but rather is a suit against the official's office . . . [citation omitted]. . . . As such, it is

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[4] The *Amicus Curiae* realizes that *Monell* is an extremely significant case with respect to the question presented but, pursuant to Rule 37.1 of the *Rules of the Supreme Court of the United States*, the *Amicus Curiae* defers to the Respondent's brief for an extended discussion of *Monell* and its immediate relevancy to the issue of policymaking liability.

no different from a suit against the State itself." *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 71 (1989) (citations omitted); *see Hafer v. Melo*, ___ U.S. ___, 112 S. Ct. 358, 361 (1991). Thus, the Eleventh Amendment, which bars a damages action against a state in federal court would also bar an action against a state official sued for damages in his official capacity. *Kentucky v. Graham*, 473 U.S. 159, 169 (1985). This Court noted in *Graham* that this is so because a judgment against a public official, in his official capacity, " 'imposes liability on the entity that he represents'." *Id.* (*quoting Brandon*, 469 U.S. at 471).

In order for a governmental entity to be held liable for the actions of a particular official, the official, because of his office, must be vested with the authority to make policy. This is because a policymaker when setting policy for a governmental entity necessarily acts in his "official capacity". Thus, in order for an official to be considered a policymaker for a municipality, he must be a representative (i.e., agent or officer) of the municipality and must be vested by law, rule or ordinance to act for the municipality.

Federal courts, in interpreting the Eleventh Amendment, have consistently found Alabama sheriffs (executive officers of the state) and their deputies to be employees of the state and not the county. Consequently, suits against them in their official capacity are routinely dismissed based upon lack of jurisdiction. *See Dean v. Barber*, 951 F.2d 1210, 1215 n.5 (11th Cir. 1992); *Free v. Granger*, 887 F.2d 1552, 1557 (11th Cir. 1989); *Parker v. Williams*, 862 F.2d 1471, 1476 (11th Cir. 1989); *see also, Carr v. City of Florence, Ala.*, 916 F.2d 1521, 1527 (11th Cir. 1990) (Alabama sheriff's Eleventh Amendment immunity also

extends to deputy sheriffs). Even the district judge below did not dispute Sheriff Morgan's entitlement to Eleventh Amendment Immunity as an officer of the state.

The Petitioners' argument that sheriffs are policymakers for the county cannot be reconciled with the holding that an Alabama sheriff is a representative and officer of the State of Alabama for purposes of the Eleventh Amendment. A public servant cannot serve two masters at the same time for the same function. A sheriff in Alabama, therefore, is necessarily a policymaker for the state and not the county. It appears that the majority of jurisdictions which have considered both questions – Eleventh Amendment coverage and policymaking status – have ruled consistently: either the sheriff, in matters of law enforcement, is a state policymaker also receiving Eleventh Amendment protection in his official capacity, or, the sheriff is a county policymaker and does not receive Eleventh Amendment immunity. *Compare Swint v. City of Wadley, Ala.*, 5 F.3d 1435 (11th Cir. 1993), *opinion modified*, 11 F.3d 1030 (11th Cir. 1994) with *Dean, Parker, Free,* and *Carr, supra* (Alabama sheriffs are state policymakers for purposes of law enforcement and receive Eleventh Amendment immunity); *Thompson v. Duke*, 882 F.2d 1180 (7th Cir. 1989), *cert. denied*, 495 U.S. 929 (1990) (Illinois county not liable for sheriff's jail policies) and *Scott v. O'Grady*, 975 F.2d 366, 371 (7th Cir. 1992), *cert. denied*, 113 S. Ct. 2421 (1993) (Illinois sheriffs receive Eleventh Amendment immunity); *Davis v. Mason County*, 927 F.2d 1473 (9th Cir.), *cert. denied*, 112 S. Ct. 275 (1991) with *Danzer v. Cowlitz County Superior Court*, 911 F.2d 737

(9th Cir. 1990) (Washington sheriffs are county policymakers and do not receive Eleventh Amendment protection); *Lucas v. O'Loughlin*, 831 F.2d 232, 234-35 (11th Cir. 1987), *cert. denied*, 485 U.S. 1035 (1988) with *Hufford v. Rogers*, 912 F.2d 1338 (11th Cir. 1990), *cert. denied*, 499 U.S. 921 (1991) (Florida sheriffs are county policymakers and do not receive Eleventh Amendment protection); *But compare Himple v. Moore*, 673 F.Supp. 758, 759 (E.D. Va. 1987) (Virginia sheriffs are not final county policymakers) with *Beardsley v. Webb*, 30 F.3d 524 (4th Cir. 1994) (Virginia sheriffs in their official capacities are *not* protected by Eleventh Amendment); *Ruehman v. Sheahan*, Nos. 93-4031, 94-1333, 1994 WL 479501 (7th Cir. Sept. 6, 1994) (Illinois sheriffs do not receive Eleventh Amendment immunity where state law leaves them discretion).

III. THE SIXTH CIRCUIT'S CONCLUSIONS AS TO THE STATUS OF SHERIFFS UNDER OHIO LAW IN *PEMBAUR* DOES NOT CONTROL EITHER THE ELEVENTH CIRCUIT'S OR THIS COURT'S ANALYSIS OF SHERIFFS UNDER ALABAMA LAW.

A. This Court, in reversing the Sixth Circuit in *Pembaur*, did not review the Sixth Circuit's determination as to whether Ohio sheriffs were county policymakers, but merely deferred to the court of appeals' interpretation of state law.

The Petitioners and their *amici* contend that this Court's holding in *Pembaur v. City of Cincinnati* controls the question in the instant case. However, that is not the case. Instead, this Court in *Pembaur* refused to delve into

the minutiae of Ohio state law and re-examine the Sixth Circuit's basis for holding Ohio counties liable for the misconduct of sheriffs and prosecutors. Instead, the Court merely accepted the Sixth Circuit's determination as being the "definitiv[e] constru[ction] . . . " of Ohio law and proceeded to analyze the county's liability under § 1983, taking the Sixth Circuit's determination as a given. 475 U.S. at 491. (O'Connor, J., concurring). Justice Brennan, in writing for the majority, consistently referred to the description of Ohio sheriffs as final county policymakers as being the Sixth Circuit's conclusion, and not the conclusion of this Court.

> Based upon *its* examination of Ohio law, the *Court of Appeals* found it "clea[r]" that the Sheriff and the Prosecutor were both county officials authorized to establish "the official policy of Hamilton County" with respect to matters of law enforcement.

475 U.S. at 476 (citation omitted) (emphasis added); *see also* 475 U.S. at 484. ("[T]he *Court of Appeals* concluded, based upon *its* examination of Ohio law . . . ") (emphasis added). Because the Sixth Circuit's determination on the issue of final policymaking authority necessarily arises out of state law, 475 U.S. 483, this Court, as is its practice in matters involving state law, afforded the determination "great deference." 475 U.S. 484 n.13 (*citing United States v. S.A. Empressa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 815, n.12 (1984); *Brockett v. Spokane Arcades, Inc.* 472 U.S. 491, 499-500 (1985) (citing cases); *Bishop v. Wood*, 426 U.S. 341, 345-347 (1976)). Deference to the courts of appeals' expertise in handling state law questions with respect to policymaking authority also is

evident in *Jett v. Dallas Indep. School Dist.* 491 U.S. at 738 ("We think the Court of Appeals, whose expertise in interpreting Texas law is greater than our own, is in a better position to determine whether [the defendant] possessed final policymaking authority. . . . ").

B. If the Sixth Circuit in *Pembaur* had analyzed Ohio sheriffs under the "right to control" paradigm propounded by the Respondent, arguably, the result would not have changed: Ohio law does in fact give county governments significant control over sheriffs.

Although Ohio sheriffs, like their Alabama counterparts, are elected by county electors and look to county government for fiscal support, there are significant distinctions. In contrast to Alabama sheriffs who hold a reporting duty to the governor and are supervised by state circuit judges, *see supra*, Ohio sheriffs are required to make certain reports directly to the Ohio county governmental units. Ohio Rev. Code Ann. § 311.16 (Anderson 1988). While Alabama law directs sheriffs' vacancies to be filled by the governor, Ohio county commissions have the power to fill vacancies in the sheriff's office. *See State ex rel. Grace v. Bd. of Elections of Franklin County*, 78 N.E.2d 38 (Ohio 1948).

IV. REQUIRING A SUBSTANTIVE "RIGHT TO CONTROL" BEFORE IMPOSING COUNTY LIABILITY IS SUPERIOR TO THE "ORIGIN OF SALARY/ GEOGRAPHIC JURISDICTION" LITMUS TEST PROPOSED BY PETITIONERS.

Although this Court made it clear in *Pembaur, Praprotnik*, and *Jett*, that the determination as to whether a

particular local official was a policymaker for a particular governmental body was to be based exclusively on an examination of state law[5], this Court has nowhere articulated exactly what a lower court should look for in its examination of state law. In that sense, the Court in this case is facing a "blank slate" upon which it can draft guiding principles which federal courts can use in their examination of state law. Evidently, this was the very reason a writ of certiorari was granted. The circuit courts of appeals have attempted to formulate the guiding principles of state law but were unable to come to a consensus; two divergent (and arguably, mutually exclusive) conclusions were reached. The Sixth Circuit's decision in *Pembaur*[6] emphasized electoral base (county voters elect the sheriff) and fiscal support (county pays sheriff's department's salaries and pays for equipment) to find the sheriff was a county policymaker. The Eleventh Circuit, in the instant case, looked to more substantive issues, such as from where does the sheriff's law enforcement authority emanate (state government) and which governmental entity has the ability to control the sheriff and his policies (state government). The Petitioners argue, probably correctly, that the Sixth Circuit's "origin of fiscal support/electoral base" analysis favors their position while the Respondents emphasize the logic and practicality of the Eleventh Circuit's "right to control" model. Rarely does the Court face such clearly defined and well-

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[5] *See supra* at pp. 5-6 of this brief.

[6] Petitioners argue that this Court's opinion in *Pembaur* controls the issue of whether Alabama sheriffs are county or state policymakers; however, that issue was not before this Court in *Pembaur*.

articulated mutually exclusive alternatives. *Amicus curiae* Jefferson County, for the reasons stated below, finds the reasoning behind the "right to control" option far superior to the Sixth Circuit's analysis.

A. Applying the Petitioners' proposed test for determining whether particular officials are county or state policymakers to other Alabama officials illustrates the test's impracticality.

The Petitioners do not propose a workable standard or "bright line" for determining whether certain officers are final policymakers for the state or for the county. In Alabama many officials who are undoubtedly state officials are elected exclusively by county electors, are provided offices in the county courthouse, and receive at least a portion of their salary from the county. Adopting the Petitioners' "origin of salary/geographic jurisdiction" test would arguably bring a host of such officials under the umbrella of those who can create county liability by their conduct even though they have only de minimus contacts with the county and cannot be controlled by the county.

1. District Attorneys.

In Alabama, district attorneys are constitutional state officers of the executive branch, "the foremost representative of the executive branch of government in the enforcement of criminal law in [their] county."[7] *Dickerson v. State*,

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[7] *Compare* this description of district attorneys from *Dickerson* with the Petitioners' description of Alabama sheriffs:

414 So. 2d 998, 1008 (Ala. Crim. App. 1982); *see also Hooks v. Hitt*, 539 So. 2d 157, 159 (Ala. 1988) (district attorney and all in his employ are employees of state). Yet, in at least 23 of Alabama's 67 counties[8], district attorneys are elected exclusively by electors from a single county. Ala. Const. amend. 328, § 6.20; Ala. Code § 12-11-2 (1975). Although their primary salary comes from the state, district attorneys may receive supplements to their salaries from the county. Ala. Code § 12-17-220(d) (1975). Furthermore, district attorneys operate from an expense account known as the District Attorney's Fund, which is held by the county treasury. Ala. Code § 12-17-197 (1975). Like the sheriff, the county must also provide the District Attorney with an office, as well as a courtroom, and may also provide the District Attorney with "additional court supportive personnel, services, equipment, and furnishings." Ala. R.J. Admin. 3(A). "In the event the courthouse is inadequate to supply office rooms for such officer [as the District Attorney], the county commission may lease such office rooms in a convenient location in the county site *and pay rental from the county fund.*" Ala. Code § 11-3-11(a)(1) (1975) (emphasis added). Applying the Petitioners' simplistic litmus test would produce absurd results: the district attorneys from the twenty-three single

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"Within the county, the sheriff is the chief law enforcement officer. . . ." Petitioners' Brief at 18.

[8] In the other 44 counties, district attorneys like circuit judges are elected from multi-county judicial districts made up of two to five counties. Ala. Code § 12-11-2 (1975).

county judicial districts would arguably be county policymakers while district attorneys in the remaining seventeen judicial circuits (covering forty-four counties) would be state policymakers, or some sort of multi-county regional policymakers – with no substantive characteristics distinguishing the two.

2. Circuit and District Judges and Circuit Clerks.

Similarly, categorizing Alabama circuit judges and district judges as either state or county policymakers would be problematic under the Petitioners' suggested analysis. Both are considered members of the state's judicial branch. Ala. Const. amend. 328, § 6.01. However, both circuit and district court judges are elected by the electors within the boundaries of their judicial circuits or districts. Ala. Const. art. VI, amend. 328, § 6.13. Again, in twenty-three counties, the judicial circuit consists of a single county. *See supra*. Both circuit and district judges are paid by the state, Ala. Code §§ 12-17-30 (1975) (circuit court judge's salary) & 12-17-68 (1975) (district court judge's salary), but may receive a supplement paid from county funds. Ala. Code §§ 12-17-30, 12-17-68 (1975). Judges are also provided with courtrooms and offices in the county courthouse at the expense of the county commission. *See* Ala. Code §§ 11-14-9, 11-14-10, 11-12-13 (1975).

Similarly, circuit court clerks (hereafter "clerks") are elected for six-year terms by the electors of each county, and vacancies are filled by the circuit court judge with jurisdiction over the county where the clerk's office is

located. Ala. Const. art. VI, amend. 328, § 6.20(b). Clerks are paid by the State, Ala. Code § 12-17-80 (1975) (employees in the clerk's office have been paid by the State since October, 1977, and prior to that time by the county), and may receive local supplements pursuant to general or local act. Ala. Code § 12-17-81 (1975). Alabama Code § 12-18-92 (1975) authorizes counties to "pay a circuit clerk a supplemental salary from the general fund of such county." The office of the circuit clerk is located in the courthouse of the county. Ala. Code § 12-17-90 (1975).

3. Members of the County Boards of Education.

The county board of education is comprised of five members elected by the electors of the county. Ala. Code § 16-8-1(a) (1975). Board members are compensated a set amount for a maximum number of days per year from the public school funds of the county. Ala. Code § 16-8-5 (1975); *see* Ala. Code § 16-1-26 (1975) (county board members may be compensated at a higher rate pursuant to a local act and approval by a majority vote of the board). The "general administration and supervision of the public schools . . . of each county . . . shall be vested in the county board of education." Ala. Code § 16-8-8 (1975); *see Hutt v. Etowah County Bd. of Educ.*, 454 So. 2d 973 (Ala. 1984) (county boards are "charged by the legislature with the task of supervising public education within the counties"). "[T]he county board[s] of education [are] by and large the governing body of the county [educational] system. . . . " *Panther Oil & Grease Mfg. Co. v. Blount County Bd. of Educ.*, 134 So. 2d 220, 223 (1961). Despite the

fact that county boards of education solely govern such matters in the county, they are local agencies of the state and are, therefore, immune from suit. *Belcher v. Jefferson County Bd. of Educ.*, 474 So. 2d 1063 (Ala. 1985); *Hutt*, 454 So. 2d at 973 (striking down the plaintiff's contention that "a county school board, like a county commission, is nothing more than an involuntary political subdivision of a county, and, therefore, subject to suit."); *see also Enterprise City Bd. of Educ. v. Miller*, 348 So. 2d 782, 783 (Ala. 1977); *Sims v. Etowah County Bd. of Educ.*, 337 So. 2d 1310, 1316 (Ala. 1976).

B. The Respondents' "right to control" standard represents a more logical and practical approach and is consistent with tort liability theory.

The superiority of the Respondents' "right to control" analysis is evident in an examination of, not only Alabama sheriffs, but also the other local officials discussed above. Sheriffs, district attorneys, judges, and judicial clerks cannot set county policy because the county has no policy in the enforcement of criminal or civil actions. These officers are empowered to enforce or implement state law by the state's constitution or through state statutory enactments. Just as certainly as the state can expand or abolish each office, it can, by legislative pronouncement, restrain the officers' conduct. On the other hand, the county commission could pass a stack of resolutions purporting to establish policy for the particular officer which would have no legally binding effect; the resolutions could be ignored with impunity. Nor does the fiscal relationship between the county commission and

these officers provide any real control. The county is mandated by state law to provide the budgetary support described above.

Counties and their representative bodies, the county commissions, should only be held liable for the policies or conduct of officials under their control. Certainly, if the county commission or its road engineer condoned racially discriminatory policies in the distribution of road building or maintenance resources, the county could be held liable. *See Presley v. Etowah County Comm'n*, 502 U.S. 491 (1992) (opining that although county commission's road decisions did not implicate the Voting Rights Act, discriminatory policies could be "actionable under a different remedial scheme.").

If the tripartite goals of 42 U.S.C. § 1983, similar to general tort law, is to compensate the victim of constitutional deprivations, punish the wrongdoer, and deter future conduct, the Petitioners' test will only "succeed" on the first count. Making counties liable for the misconduct of state officers the county cannot control will certainly add another "deep pocket" to the list of defendants. However, holding counties liable for the wrongdoing of actors outside of their control does nothing to punish the wrongdoer or deter future misconduct. Individual capacity suits for damages against the sheriff,[9] coupled with injunctive relief leveled against the state (the sheriff in his official capacity), accomplishes all three goals while leaving Alabama county commissions free to supervise matters within their legislative prerogative (i.e,

[9] *See Dean v. Barber*, 951 F.2d 1210 (11th Cir. 1992).

road construction) and allowing the state to supervise the officers which enforce its criminal code.

CONCLUSION

Based on the foregoing, Amicus Curiae, Jefferson County, Alabama, respectfully requests that this Court affirm the holding of the Court of Appeals of the Eleventh Circuit.

Respectfully submitted,

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CONSTITUTION OF THE UNITED STATES

[Amendment XI]

[*Restriction of Judicial Power*]

The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state.

ALA. CONST. of 1901 art. V, § 112

The executive department shall consist of a governor, lieutenant governor, attorney-general, state auditor, secretary of state, state treasurer, superintendent of education, commissioner of agriculture and industries, and a sheriff for each county.

ALA. CONST. of 1901 art. V, § 121

The governor may require information in writing, under oath, from the officers of the executive department, named in this article, or created by statute, on any subject, relating to the duties of their respective offices, and he may at any time require information in writing, under oath, from all officers and managers of state institutions, upon any subject relating to the condition, management

and expenses of their respective offices and institutions. Any such officer or manager who makes a willfully false report or fails without sufficient excuse to make the required report on demand, is guilty of an impeachable offense.

ALA. CONST. of 1901 art. V, § 138

A sheriff shall be elected in each county by the qualified electors thereof, who shall hold office for a term of four years, unless sooner removed, and he shall be ineligible to such office as his own successor; provided, that the terms of all sheriffs expiring in the year nineteen hundred and four are hereby extended until the time of the expiration of the terms of the other executive officers of this state in the year nineteen hundred and seven, unless sooner removed. Whenever any prisoner is taken from jail, or from the custody of any sheriff or his deputy, and put to death, or suffers grievous bodily harm, owing to the neglect, connivance, cowardice, or other grave fault of the sheriff, such sheriff may be impeached under section 174 of this Constitution. If the sheriff be impeached, and thereupon convicted, he shall not be eligible to hold any office in this state during the time for which he had been elected or appointed to serve as sheriff.

ALA. CONST. of 1901 art. VII, § 173

The governor, lieutenant-governor, attorney-general, state auditor, secretary of state, state treasurer, superintendent of education, commissioner of agriculture and industries, and justices of the supreme court may be removed from office for willful neglect of duty, corruption in office, incompetency, or intemperance in the use of intoxicating liquors or narcotics to such an extent, in view of the dignity of the office and importance of its duties, as unfits the officer for the discharge of such duties, or for any offense involving moral turpitude while in office, or committed under color thereof, or connected therewith, by the senate sitting as a court of impeachment, under oath or affirmation, on articles or charges preferred by the house of representatives. When the governor or lieutenant-governor is impeached, the chief justice, or if he be absent or disqualified, then one of the associate justices of the supreme court, to be selected by it, shall preside over the senate when sitting as a court of impeachment. If at any time when the legislature is not in session, a majority of all the members elected to the house of representatives shall certify in writing to the secretary of state their desire to meet to consider the impeachment of the governor, lieutenant-governor, or other officer administering the office of governor, it shall be the duty of the secretary of state immediately to notify the speaker of the house, who shall, within ten days after receipt of such notice, summon the members of the house, by publication in some newspaper published at the capitol, to assemble at the capitol on a day to be fixed by the speaker, not later than fifteen days after the receipt of the notice to him from the secretary of state, to consider the impeachment

of the governor, lieutenant-governor, or other officer administering the office of governor. If the house of representatives prefer articles of impeachment, the speaker of the house shall forthwith notify the lieutenant-governor, unless he be the officer impeached, in which event he shall notify the secretary of state, who shall summon, in the manner herein above provided for, the members of the senate to assemble at the capitol on a day to be named in said summons, not later than ten days after receipt of the notice from the speaker of the house, for the purpose of organizing as a court of impeachment. The senate, when thus organized, shall hear and try such articles of impeachment against the governor, lieutenant-governor, or other officer administering the office of governor, as may be preferred by the house of representatives.

ALA. CONST. of 1901 art. VII, § 174

The chancellors, judges of the circuit courts, judges of the probate courts, and judges of other courts from which an appeal may be taken directly to the supreme court, and solicitors and sheriffs, may be removed from office for any of the causes specified in the preceding section or elsewhere in this Constitution, by the supreme court, under such regulations as may be prescribed by law. The legislature may provide for the impeachment or removal of other officers than those named in this article.

ALA. CONST. of 1901 art. VII, § 175

The clerks of the circuit courts, or courts of like jurisdiction, and of criminal courts, tax collectors, tax assessors, county treasurers, county superintendents of education, judges of inferior courts created under authority of section 168 of this Constitution, coroners, justices of the peace, notaries public, constables, and all other county officers, mayors, intendants, and all other officers of incorporated cities and towns in this state, may be removed from office for any of the causes specified in section 173 of this Constitution, by the circuit or other courts of like jurisdiction or a criminal court of the county in which such officers hold their office, under such regulations as may be prescribed by law; provided, that the right of trial by jury and appeal in such cases shall be secured.

ALA. CONST. of 1901 amend. No. 35 (amending art. V, § 138)

A sheriff shall be elected in each county by the qualified electors thereof who shall hold office for a term of four years, unless sooner removed, and he shall be eligible to such office as his own successor. Whenever any prisoner is taken from jail, or from the custody of any sheriff or his deputy, and put to death, or suffers grevious [grievous] bodily harm, owing to the neglect, connivance, cowardice, or other grave fault of the sheriff, such sheriff

may be impeached, under section 174 of this Constitution. If the sheriff be impeached, and thereupon convicted, he shall not be eligible to hold any office in this state during the time for which he had been elected or appointed to serve as sheriff.

ALA. CONST. of 1901 amend. No. 328, § 6.20

(a) A district attorney for each judicial circuit shall be elected by the qualified electors of those counties in such circuit. Such district attorney shall be licensed to practice law in this state and shall, at the time of his election and during his continuance in office, reside in his circuit. His term of office shall be for six years and he shall receive such compensation as provided by law. Vacancies in the office of district attorney and in his staff shall be filled as provided by law.
